U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 29Jan2002

Case No.: 2000-INA-200
In the Matter of:

B & M IMPORTS,
Employer,

on behalf of

VITALI VAROL,
Alien

Appearance: Marsha Edelman, Esq.

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Vitali Varol ("Alien") filed by B & M Imports ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties.

STATEMENT OF THE CASE

On January 18, 1996, Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Purchasing Agent. Minimum requirements for the position were listed as a Bachelor's degree in Business Administration, one year of experience in the job offered or as operations manager for a jewelry importer, and fluency in the Turkish language. The job to be performed was described as follows:

Purchase gold jewelry from vendors in Turkey and Italy for resale in the U.S. Examine and select products, negotiate purchase price. Arrange transportation of products to the U.S. including customs documents, letters of credit and shipping paperworks. Discuss defective goods with vendors and customers to determine source of trouble. (AF 16).

The State Alien Employment Certification Office issued a Notice on February 11, 1997, notifying Employer that its requirements of a degree in business administration and fluency in the Turkish language were considered excessive, and thus a restrictive requirement. (AF 6-9).

Employer responded that it had always employed a Turkish speaking person who was able to communicate with its Turkish vendors. The Employer noted that it also imported products from Mexico, and had personnel who were fluent in Spanish to communicate with Mexican vendors and production personnel. The Employer stated that the purchasing agent was responsible for purchasing millions of dollars worth of gold jewelry, and had to negotiate purchase prices, arrange for payments and letters of credit, and be knowledgeable in the areas of credit analysis and finance. According to the Employer, this requires the "performance of financial analysis of various business records as well as economic analysis and determination of sales prices which are necessary for a profitable operation. The purchasing agent is also expected to maintain account records and be able to function in an international business background." The Employer noted that its previous employee had a bachelor's degree in Business Administration, and that in Employer's experience, an individual without a bachelor's degree could not perform the financial duties of the position. The Employer amended its application to include a bachelor's degree in marketing. (AF 10-18).

The CO issued a Notice of Findings (NOF) on September 2, 1998, proposing to deny labor certification based upon Employer's unduly restrictive job requirements. The CO stated that the Employer's requirements for a Bachelor's Degree in Business Administration or Marketing, and fluency in the Turkish language, were unacceptable, and appeared to be tailored to the Alien's educational and ethnic background. (AF 27-29). The CO found that the documentation submitted by the Employer failed to adequately document a business necessity for these restrictive requirements. The CO required the Employer to submit evidence that the requirements arise from a business necessity, including documentation that it is normal and customary within the industry to require Wholesalers to have a Bachelor's Degree in either Business Administration or Marketing, and to be fluent in the language of the country that they do business with. Additionally, the CO required the Employer to submit documentation on a number of additional issues dealing with the Turkish language requirement. The CO noted that the Wholesaler would also purchase jewelry from vendors in Italy, but there was no requirement of fluency in Italian; the CO required the Employer to explain this rationale. Finally, the Employer was required to document that the job as currently described existed before the Employer filed the application for Alien Employment Certification. Alternatively, the Employer could amend its application by deleting the requirements.

In Rebuttal, the Employer submitted a letter from its President, Mois Medine, indicating that the

Employer had eliminated the requirement for fluency in Turkish, but retained its educational requirement of a bachelor's degree in Business Administration or Marketing. (AF 28-37). Mr. Medine indicated that this was the Employer's standard minimum education requirement, and it was required of past and present employees. The Employer stated that the position of Purchasing Agent was previously held by Marie Joanna Arambulo, who held a bachelor's degree in Business Administration. According to Mr. Medine, this is a standard requirement in the industry for corporations with revenues as large as the Employer's. Mr. Medine submitted a copy of Ms. Arambulo's degree, as well as her W-2 for 1995.

The Employer also submitted a letter from Donald C. Hambrick, a Professor of Democratic Business Enterprise at the Graduate School of Business at Columbia University, stating that he had reviewed the job description and concluded that the responsibilities require a bachelor's degree in business administration. Professor Hambrick stated that the responsibilities were complex, and required an understanding of business subjects such as accounting, economics, marketing, operations, and international trade. According to Professor Hambrick, the Employer is a significant firm, whose competitors would fill such positions with bachelor-educated employees.

The Employer also submitted a letter from Lawrence J. Sebastian, of Sebastian Services, Financial & Administrative Consulting. Mr. Sebastian indicated that he had reviewed the corporate financial and business history, and documentation submitted by B & M Imports, and in his opinion the position of Purchasing Agent for the Employer requires an individual with a professional background possessing, at a minimum, a bachelor's degree in Marketing or Business Administration. He felt that the job duties and responsibilities of the Purchasing Agent with the Employer are the normal job duties and responsibilities required for a position with a similar corporation in the industry, and required the application of theoretical and practical professional knowledge in a highly specialized field. In his opinion, a bachelor's degree in Marketing or Business Management is a minimum requirement.

On December 16, 1998, the CO notified the Alien Employment Certification Office that the Employer had deleted the language requirement and successfully documented its business necessity for its degree requirement, and that the case was ready for advertising and recruitment. (AF 38). Four applicants were referred to the Employer, but all were rejected. In her Notice of Findings (NOF), dated July 15, 1999, the CO determined that, based on the Employer's minimum requirements for the job offered, and the applicants' qualifications as based on their resumes, two of the applicants were fully qualified for the job and were rejected for reasons not lawful or job related. (AF 62-64). Specifically, the CO noted that Helena Li was eminently qualified for the position. The Employer's recruitment report stated that Ms. Li was contacted within ten days after receipt of her resume, but was no longer interested as she had found other employment. The CO also found that Joseph Nicolosi was qualified for the position. The Employer stated that it left several messages on Mr. Nicolosi's answering machine, and then sent him a certified letter asking him to contact the Employer. The Employer submitted a copy of the letter, a certified mail receipt, and a signed return receipt, but there was no other evidence in the file showing that the Employer tried to contact Mr. Nicolosi before sending the certified mail letter.

The CO required the Employer to provide proof that it had contacted each of these applicants, consisting of certified mail receipts, signed certified return cards, and/or itemized telephone bills showing the applicants' telephone number and length of time of the call. The CO stated that the telephone company would issue itemized bills if requested.

In Rebuttal, the Employer again submitted a copy of the letter sent to Mr. Nicolosi, indicating that it had left numerous telephone messages for him, asking him to call if he was still interested in the position. The Employer also re-submitted the certified mail receipt and the signed return receipt.

Employer's counsel represented that between February 10 and February 20, 1999, Faisal Cora, the Controller of B & M Imports Inc., made ten telephone calls to Ms. Li, each time speaking with Ms. Li's mother, and requesting that Ms. Li return the call and schedule an appointment. Ms. Li eventually returned the calls, and spoke to Ms. Cora sometime between February 20 and March 1, 1999, and stated that she was no longer interested, because she had taken another job.

Ms. Edelman also stated that the Employer called Mr. Nicolosi several times within ten days after receiving his resume, and left messages on his answering machine, asking him to call for an interview; he never called back. On February 17, 1999, the Employer sent him a letter, certified mail, return receipt requested, asking him to call for an interview. He did not respond. Ms. Edelman also noted that Mr. Nicolosi's education does not qualify him for the job, as he holds a Bachelor's degree in Political Science.

Finally, Ms. Edelman enclosed telephone records for February 1999, noting that the calls to Ms. Li and Mr. Nicolosi did not register on the records, because they lasted for less than one minute.

On September 23, 1999, the CO issued her Final Determination (FD), denying certification on the grounds that the Employer failed to show that two qualified U.S. workers (Ms. Li and Mr. Nicolosi) were contacted and rejected for lawful job related reasons. (AF 88-89). The CO stated that

> Employer's rebuttal reiterates the original reasons for rejecting applicants and included itemized telephone bills and a letter accompanied by a certified mail receipt and a signed certified return card for one of the applicants. Upon careful review of the letter and certified mail receipt, it is noted that the letter was written 15 days after the post mark date on the certified mail receipt. In addition, the itemized telephone listing does not list of these applicants' telephone numbers. Employer has failed to provide evidence that either of these two (2) U.S. workers were ever contacted.

On October 29, 1999, counsel for the Employer filed a request for reconsideration, or in the alternative, for review by the Office of Administrative Law Judges. (AF 108-110). Counsel stated that the Employer attempted to obtain all of its telephone records before the rebuttal deadline, but when the telephone company forwarded the records, they did not include the telephone numbers of the

applicants. Counsel contacted a telephone company customer service representative, and was advised that calls of less than one minute would not register on the records. After the FD was issued on September 23, 1999, the Employer was able to obtain the records from a different customer service representative, showing six calls to Mr. Nicolosi and four calls to Ms. Li.

Counsel also stated that the letter to Mr. Nicolosi was actually mailed on February 17, 1999, the date stamped on the certified mail receipt. However, on March 4, 1999, the Employer printed a copy of the letter from its computer to send to counsel, and the date of the letter was inadvertently changed to March 4, 1999.

Counsel argued that the Employer's failure to obtain the requested telephone records in a timely manner was the fault of the telephone company, and that the Employer should not be penalized for the failure to supply these records. Counsel asserted that this situation required extraordinary relief from the regulatory deadline in order to avoid manifest injustice to the Employer, citing *Madeleine S. Bloom*, 1988-INA-152 (October 13, 1989).

On January 21, 2000, the CO denied the request for reconsideration, stating that motions for reconsideration will be entertained only with respect to issues which could not have been addressed in the rebuttal, and citing *Harry Tancredi*, 1988-INA-441. (AF 111). As the motion did not raise such matter, it was denied, and the application was forwarded to the Board of Alien Labor Certification Appeals. The matter was docketed in this office on May 2, 2000.

DISCUSSION

In prior *en banc* decisions, this Board has consistently held that employers are under an affirmative duty to commence recruitment and make all reasonable attempts to contact applicants as soon as possible. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*); *Creative Cabinet & Store Fixture, Co.*, 1989-INA-181 (Jan. 24, 1990) (*en banc*). The burden is upon the employer to document its good faith recruitment efforts, *e.g., Aquatec Water Systems*, 2000-INA-150 (Sept. 21, 2000); *American Gas & Service Center*, 1998-INA-79 (Jan. 12, 1999). In *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001)(*en banc*),the Board held that in order to establish good faith recruitment, an employer does not need to establish actual contact of applicants, but only reasonable efforts to do so.

Most BALCA panels have taken the position that reasonable efforts to contact qualified U.S. applicants may require more than a single type of attempted contact. *Diana Mock*, 1988-INA-255 (Apr. 9, 1990); *C'est Pzazzz Industries*, 1990-INA-260 (Dec. 5, 1991); *Any Phototype, Inc.*, 1990-INA-63 (May 22, 1991); *Gambino's Restaurant*, 1990-INA-320 (Sept. 17, 1991); *Sierra Canyon School*, 1990-INA-410 (Jan. 16, 1992); *Zephyr Grill Restaurant*, 1996-INA-00269 (May 7, 1998); *S. Balian Designs*, 1989-INA-299 (Sept. 20, 1991); *Johnny Air Cargo*, 1997-INA-123 (Mar. 4, 1998). What constitutes a reasonable effort to contact a qualified U.S. applicant depends on

the particular facts of the case under consideration. Where an employer establishes timely, actual contact, a reasonable effort is proved. *HRT Clinical Laboratory*,1997-INA-362 (March 10, 1998).

An employer may prove that it contacted U.S. applicants by producing copies of certified mail, return receipt requested. *E.g., American Gas & Service Center*, 1998-INA-79 (Jan. 12, 1999)*; Mattco Equities, Inc*., 1997-INA-400 (June 30, 1998). But an employer must be given an opportunity to prove that its overall recruitment efforts were in good faith, even if it cannot produce certified mail return receipts to document its contacts with U.S. applicants. Moreover, a CO may not summarily discard an employer's assertions about what efforts were made to contact applicants. Employers should be cognizant, however, that although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

Here, the Employer provided the details of its numerous attempts to contact Ms. Li by telephone, and represented that when Ms. Li finally did return the calls, she was no longer interested in the job. The Employer made a good faith effort to comply with the CO's request, by attempting to obtain records of these calls, but was unable to obtain them from the telephone company within the rebuttal deadline. By the time the Employer obtained these records, which are consistent with the information provided by the Employer in rebuttal, as they indeed document calls to Ms. Li, the time for rebuttal had passed.

Although we do not find that this case presents the especially egregious set of circumstances that invoke the manifest injustice standard stated in *Madeleine S. Bloom*, 1988-INA-152 (Oct. 13, 1989) (*en banc*),[1] we nonetheless find that it was an abuse of discretion for the CO not to reconsider the Final Determination in regard to the telephone records. In denying the motion to reconsider, the CO cited *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*) for the proposition that "motions for reconsideration will be entertained only with respect to issues which could not have been addressed in the rebuttal." This is an over-interpretation of what *Tancredi* said in regard to the standard for when a motion for reconsideration must be considered. Rather, the Board held:

> ...We hold that the Certifying Officer has th[e] authority [to reconsider]. In addition, since CO's have the authority to reconsider their decisions, in any case where a motion for reconsideration of a Final Determination is filed, a ruling shall be issued by the CO stating whether the motion is granted or denied.
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> This does not mean that the CO must reconsider a denial of certification whenever such a motion is filed. Nor must the CO accept the validity of evidence submitted on

> reconsideration and change the outcome of the case. But at least where, as here, the motion is grounded in allegations of oversight, omission or inadvertence by the CO which, if credible, would cast doubt upon the correctness of the Final Determination, and the Employer had no previous opportunity to argue its position or present evidence in support of its position, the CO should reconsider his or her decision.

(footnote omitted). Thus, *Tancredi* does not explicitly hold that a CO may ignore a motion to reconsider whenever an issue conceivably could have been addressed in the rebuttal. There are circumstances, such as those presented in the instant case, when it would be arbitrary and capricious not to reconsider even though an issue could have been addressed in rebuttal. Here, Employer possibly could have been more forceful in its request for telephone records from the telephone company, but it is not reasonable to hold Employer to such a high standard of knowing the telephone company's capabilities better than the telephone company representative. It is true that in the NOF, the CO stated that "[i]t is known to this office that the telephone company can and will issue itemized telephone bills if requested." Nonetheless, Employer did so request, but was told a different story by the telephone company.

In the instant case, prior to the end of the rebuttal period, Employer had requested the telephone records from the telephone company, obviously had difficulty in obtaining those records in a timely fashion (as evidenced by Employer's motion for an extension of time for rebuttal found at AF 82), and was supplied records by the telephone company that did not include local calls. Employer's motion for reconsideration is supported by the declaration of counsel for Employer documenting that different stories about the availability of local phone records were given by the telephone company customer representatives contacted before and after the Final Determination. (AF 100-101) Counsel's declaration is consistent with Employer's statement at AF 99, which also states that it got different responses from the phone company when it talked to a different representative after the Final Determination. The telephone records finally obtained from the telephone company after the Final Determination are consistent with the information provided in the rebuttal showing that attempts were made to contact applicants by phone. Under these circumstances, it was arbitrary for the CO not to reconsider as it was telephone company, and not Employer, that caused the defect in the rebuttal evidence.

The Employer also made numerous attempts to contact Mr. Nicolosi by telephone; when he did not respond, the Employer sent him a letter by certified mail, return receipt requested, asking him to call for an interview. He did not do so.[1] In her NOF, the CO mentioned the date of the certified mail

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1 The Employer also determined that Mr. Nicolosi was not qualified, because his degree was in political science. The CO did not mention this issue in her FD, and indeed Mr. Nicolosi's resume clearly reflects

receipt and the signed return receipt, but not the date of the letter itself. However, in her FD, the CO noted that this letter was dated fifteen days after the postmark date on the certified mail receipt. In its request for reconsideration, the Employer responded that it did not keep a hard copy of the letter, but printed out a copy from the computer to provide to its attorney, and the date on the letter was inadvertently changed. A notation at the bottom of this letter indicates that it was in fact telefaxed on that date. Because the CO did not raise this issue in the NOF, the Employer did not have the opportunity to respond to it in its Rebuttal. The Employer's response is consistent with its statements, telephone records, the certified mail receipt, and the signed return receipt. Under the particular circumstances of this case, it is appropriate to consider the Employer's response on this issue.

The CO was incorrect in requiring that the Employer prove actual contact of the U.S. applicants. The Employer was only required to prove that it made a reasonable effort to contact qualified U.S. applicants. The evidence submitted with the request for review, as well as the evidence submitted in rebuttal, establishes that the Employer made a reasonable effort to contact Ms. Li, who was a qualified applicant, as well as Mr. Nicolosi, who was not. Remanding this case to the CO for her consideration of the evidence submitted with the request for review would only delay the inevitable grant of certification. Therefore, the CO's Final Determination is reversed.

. **ORDER**

The Certifying Officer's denial of labor certification is hereby **REVERSED** and labor certification is **GRANTED.**

SO ORDERED.

For the panel:

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LINDA S. CHAPMAN

Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will

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that he does not possess the minimum qualifications for the job, as he does not have a degree either in business administration or marketing.

become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.